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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3641 OF 2007

Ramesh Samhari More ... Petitioner

Versus

The Registrar, Dist. Court,
Solapur and Ors. ... Respondents

ALONG WITH
WRIT PETITION NO. 3642 OF 2007

Ravindra Dattatraya Waknis ... Petitioner

Versus

The Registrar, District Court,
Solapur and Ors. ... Respondents

ALONG WITH
WRIT PETITION NO. 3643 OF 2007

Rajendra Vishwanath Kharade ... Petitioner

Versus

The Registrar District Court,
Solapur and Ors. ... Respondents

ALONG WITH
WRIT PETITION NO. 3644 OF 2007

Keshav Govind Jahagirdar ... Petitioner

Versus

The Registrar, District Court,
Solapur & Ors. ... Respondents

ALONG WITH
WRIT PETITION NO. 3645 OF 2007

Haridas Narayan Potabatti ... Petitioner

Versus

The Registrar, District Court,
Solapur and Ors. ... Respondents

Mr. I.M. Khairdi for the Petitioners.

Mr. R.D. Rane, Govt. Pleader for the Respondents.

CORAM: F.I. REBELLO &
R.M. SAVANT, JJ.
DATED: JUNE 29, 2007

ORAL JUDGMENT (Per F.I. Rebello,J.):

. Rule in all the petitions. As the Petitions raise a common question of law they are being decided by this common judgment. All the Petitioners herein pursuant to the test conducted by the Committee headed by the District Judge were promoted. The Petitioners in Writ Petition Nos. 3641 of 2007, 3643 of 2007 were promoted to the post of Assistant Superintendent. The Petitioners in Writ Petition No. 3642 of 2007, 3644 of 2007 and 3645 of 2007 were promoted to the post of Senior Clerks.

2. The selection procedure for promotion for these posts is governed by Clause 580 of the Civil Manual. The relevant clause for our purpose is clause (ii)(b) which reads as under :

" The District Judge may, if for reasons to be recorded in writing, considers it to be so desirable, appoint a Committee to subject the employees within the Zone of consideration to an appropriate test, and may also consider the result

of such test."

. For the purpose of setting the procedure for filling in the vacancies, the Advisory committee met on 8.3.2005. The committee unanimously decided to call thrice the number of eligible candidates according to their seniority for the test to be taken in terms of Clause 580 (ii)(a)(b) of the Civil Manual, 1986. All employees who were eligible and in the zone of consideration were to be called for the interview which included both written test and oral interview. The committee decided that in the written test one should obtain minimum 17 marks out of 50 marks. Marks were also allotted under other heads. There was also a decision taken that while calling an incumbent to appear for the test for the promotional post, incumbent should be allowed only three chances and if they are not selected to the promotional post, they should be debarred permanently for consideration in the said post. The committee also decided that the oral test should be held of only those candidates who pass written test.

. The committee once again met on 19.3.2005 to consider marks obtained at the written examination. Two candidates who had obtained 12 and 15 marks respectively were not called for the oral interview. The committee also on that date considering that

these two employees had already availed of three attempts directed that they were barred from further consideration for promotion. It was further decided that any of the persons who were barred to apply for further promotion including the aforesaid two employees if they had completed 12 years of service and had been granted higher pay scale under the Assured Progress Scheme that should be withdrawn as they are not eligible for further promotion. Accordingly, an order came to be passed on 22.3.2005 withdrawing the higher pay scale granted under the Assured Progress Scheme.

3. The two candidates Mr. V.R. Kulkarni and Mrs. P.P. Paithankar made representations no 20.7.2005 and 11.08.2005 respectively against they being barred from further consideration for promotion and withdrawal of scale under Assured Progress Scheme (A.P.S.). On receipt of the representations comments were invited of the District Judge Solapur and to set out in detail the reasons for non selection of the two representationists as also withdrawal of the payscale under A.P.S.

4. It appears that on 16.11.2005, the District & Sessions Judge, Latur who had sought some clarification on the Administrative side of this court in the manner of conducting the examinations

was informed that this court had taken a decision to hold oral test only of the candidates within the zone of consideration of promotion to the post of senior clerks, Assistant Superintendents and Superintendents. The promotion of the Petitioners in the instant case were done by Order dated 22.3.2005. The representations of the two representationists were considered on the Administrative side of this court and after considering the same, the District Judge, Solapur was informed that the promotions of the promottees to the post of Superintendent are set aside and selection process for promotion of senior clerk to Assistant Superintendents be undertaken again. The District Judge was also informed that both the representationists were entitled to restoration of the Assured Progress Scheme. Before the disposal of the representations, it appears by communication dated 30.12.2006, the principal District Judge, Solapur was pleased to inform the registry of this court that one Shri. A.R. Pawle, Sr. Clerk who had made a representation regarding his non promotion had expired on 18.4.2006 and Shri. V.R. Kulkarni had retired by superannuation on 30.11.2006. Pursuant to the communication the District Judge served an Order on the Petitioner that they would stand reverted. Apprehending that pursuant to the orders received on 23.4.2007 that

they would be reverted the petitioners filed the present petitions. When the matter came up on 4.5.2005 while issuing notice this court granted interim relief in terms of Prayer Cause (c) in the petitions.

5. Reply has been filed on behalf of the Respondent Nos. 1 to 4. Our attention is invited to the amendment effected to Para 580 of the Civil Manual on 22.2.2001 which includes appointing a committee to subject the employees within the zone of consideration to an appropriates test. It is however set out that Para 580 of the Civil Manual does not contemplate holding of written examination.

6. A perusal of the representationists made by Mr. Kulkarni and Mrs. Paithankar would indicate that the grievances are more or less similar. It was their contention that they have passed booth the lower standard departmental examination (L.S.D.E.) and higher standard departmental examination (H.S.D.E.). Both the candidates did not deny that they were given opportunity to appear for the written examination. Shri. Kulkarni pointed out that the examination was difficult and further pointed out that the pay scale given were as per the Assured Progress Scheme and could not have been withdrawn. It was further contended that after

three opportunities the candidate cannot be debarred permanently from applying for the promotional post as that would be arbitrary. It was therefore, prayed that the order of the District Judge withdrawing the concession granted and debarring them from being considered for promotion for higher post be set aside and the concession granted (A.P.S.) be restored and that the Petitioners be held fit for consideration for promotion to the higher post. Similarly Mrs. Paithankar also prayed that the order withdrawing higher pay scale should be set aside and she should not be debarred from appearing for further promotions. From both these representations it will be clear that the Petitioners had not sought any relief for setting aside the promotions of those candidates who had been promoted to the post of superintendent. Shri. Paule since deceased seems to have made representation against his non-selection. With this background, we may now decide the controversy.

7. The first contention which has to be answered is whether the decision taken on the administrative side by the High Court based on queries from the District & Sessions Judge, Latur on 25.4.2005 would affect the promotions already done before communication of 16.11.2005. As has been noted earlier, the selections were done some time in the

month of March, 2005. The orders of appointment were issued soon thereafter in March itself. The decision on the administrative side is admittedly some time in October/November, 2005. We have earlier reproduced Clause 580(ii)(a) (b). Clause 580 left it to the discretion of the District Judge to subject the employees within the zone of consideration to an appropriate test. On a reading of the rule, it is not possible to say that the appropriate test excludes written test. However, this court on the administrative side considering that the candidate for consideration have already passed the L.S.D.E. and H.S.D.E. examinations has taken a decision that the test would not include a written statement. That interpretation or clarification at the highest can be from the date the clarification was issued and cannot affect the promotions already done as those employees had a vested right unless on the face of the rule, the rule excluded holding of a written examination. On a perusal of the rule, as it stood, we are of the considered view that holding of a written test cannot be said to be not within the meaning of the expression "appropriate test". The expression therefore, could not mean only a viva voce test and not a written test. The selection committee presided over by the District Judge therefore, could have taken a decision to hold a written test along

with viva voce. The procedure for selection therefore, did not suffer from any illegality. The communication therefore, by the respondents in directing withdrawal of promotion of the Petitioners in each of the Petitions, cannot be sustained.

8. Another aspect of the matter is that both the representationists had appeared for the examinations. It was not their case that the written examination could not have been held. They in fact appeared for the test and were not selected. In our opinion, once having taken a chance of appearing for the test and not challenging the same before the test was held, would mean participating in the selection process without demur or protest. In these circumstances, at least at the instance of the representationists, no order should have been passed to revert the Petitioners who were promoted to the post of Assistant Superintendent and Sr. Clerks. A candidate who voluntarily participates in a selection process, pursuant to a rule, which can include a written examination, should not after such candidate has not passed the examination, be entitled to contend that the process was illegal. In fact the two candidates had not made such a representation. The decision on that count on the administrative side cannot be supported. In our opinion, therefore, on this ground also the petition

are liable to be allowed.

9. The third aspect of the matter is the decision of selection committee to bar the candidates if they had appeared for three times from appearing for further examinations. We are unable to read such a power under Clause 580 of the Civil Manual or any other provision which has been brought to our attention as to how a selection committee, which is only constituted for the purpose of selecting candidate, could go beyond the scope of the rules. In service jurisprudence, once there are rules framed and if there be any lacuna, the same can be rectified by administrative instructions, to the extent the administrative instructions are not inconsistent with rules made under Article 309 of the Constitution of India or any other provisions of law. The selection committee having not being conferred power to issue such administrative instructions could not have exercised a power not vested in them. The Committee presided over by the learned District Judge, therefore, could not have debarred the representationists from appearing for further examinations. In our opinion, considering Clause 580 the decision of the committee in debarring those candidate after three attempts to appear for the examination for promotion will be clearly arbitrary and violative of Article 14 of the

Constitution of India. That decision therefore, taken at the meeting of the committee which was held on 8th March, 2005 though has not ben challenged in these petitions, nonethe less considering the relief as sought for and the same having been brought to our attention, can be said to be contrary to Rule 580 of the Manual. It is not open to the committee to act contrary to Para 580 of the Manual and to lay down any condition barring candidates for being considered for promotion.

10. The next contention namely withdrawal of the benefit under Assured Progress Scheme may now be considered. An Administrative relief has already been granted to the two representationists. The Petitioner have really not raised the issue. The issue however, is raised from time to time and employee of this court and the subordinate courts are being either denied benefit or benefit granted is being withdrawn. The question is whether merely because of non-selection to the higher promotional post can the Assured Progress Scheme already granted to any employee can be withdrawn.

. In the case of Shrirang Atmaram Nikam Versus The District Judge Thane and Others decided on 18th March, 2005 in Writ Petition No. 6977 of 2004 wherein the Government G.R. in the matter was

considered. In Para 5 of the G.R. dated 20.7.2001 the first requirement is that the candidate should possess all the requisite qualifications for promotion. The other contention is that the employees who have refused the promotion and employees who are held non-eligible for regular promotions, shall not get benefit under this scheme. In case of employees who are given any benefit of the higher pay scale under the scheme and who have refused regular promotion, and who are held to be eligible for regular promotion, shall be withdrawn. However, the monetary benefit of the pay scales given to them will not be recovered. On the reading of the said G.R. this court has taken a view that mere non selection cannot be a ground for denying the employee the higher pay scale as there may be more meritorious candidates than the candidate who is not selected considering the number of vacancies. We had therefore, applied the following test :

"The test therefore, is not whether the candidate is promoted. The test is whether the candidate is eligible."

. On the administrative side this high court has also issued directions to that effect. The time scale granted under A.P.S. therefore, could not have been withdrawn.

11. For all the aforesaid reasons, in our opinion, this petition will have to be allowed.

12. In the light of that rule made absolute in terms of Prayer Clause (b) in all the petitions.

(R.M.SAVANT, J.) **(F.I. REBELLO, J.)**